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No. 99-445

In The

Supreme Court of the United States

JOHN M. OGLESBY and LOIS P. OGLESBY,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the federal Locomotive Inspection Act preempt state-by-state regulation, including by the common law, of the design, construction and labeling of the locomotive, its parts and appurtenances?

II. Does the Federal Railroad Safety Act preempt state-by-state regulation, including by the common law, of the design, construction and labeling of the locomotive, its parts and appurtenances?

STATEMENT OF PARTIES

The petitioners are John M. Oglesby and Lois P. Oglesby,[1] plaintiffs in the district court and appellees before the court of appeals. The respondent is General Motors Corporation ("GM"), defendant in the district court and appellant before the court of appeals. Mr. Oglesby's former employer, the Delaware and Hudson Railway Company, was a defendant under the Federal Employers' Liability Act, but settled in the district court.

Pursuant to Supreme Court Rule 29.6, GM states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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[1] Petitioner's wife, Lois Oglesby, claims derivative damages for loss of consortium. Throughout this brief we refer to them together as "petitioner."

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TEXT OF PROVISIONS INVOLVED

In addition to the portions of the Locomotive Inspection Act and Federal Railroad Safety Act quoted by petitioner (Pet. 7-8), Article VI, clause 2 of the United States Constitution is involved. It provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

STATEMENT OF THE CASE

On August 13, 1986, petitioner, a trainman for the Delaware and Hudson Railway, allegedly sustained a back injury while moving the engineer's seat aboard a locomotive designed and manufactured by General Motors (GM).

Federal regulations require that the seat be securely mounted and braced. 49 C.F.R. § 229.119(a). To meet the user's needs, the seat also needs to be adjustable forward and backward. To accomplish both, the seat is mounted on a tripod that slides along a track. The seat, 62 pounds, can be removed before moving the tripod, as petitioner knew. But he did not remove it, instead pushed the whole, heavy assembly, and, he claimed, so twisted his back.

Petitioner brought this action against his employer and GM, but settled his FELA claim against his employer. Against GM, his complaint alleged a "defect in the design" of the seat and negligence and strict liability for

"failing to warn of the aforesaid defect."[2] The claim was made under New York law; petitioner admitted – and admits here – that GM met all requirements of federal law. (Pet. 15)

All claims other than for failure to warn were withdrawn or ended in summary judgment for GM on grounds unrelated to preemption.[3] GM then moved for summary judgment on the failure-to-warn-of-the-alleged-defect claim, contending it was preempted by the Locomotive Inspection Act ("LIA"), 49 U.S.C. §§ 20701-20903, because it fell squarely within the field that LIA has occupied for over 70 years. *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926). GM also contended the claim was preempted by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20143, which preempts state law when a federal standard

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[2] Petitioner's representations that the failure-to-warn claim does not "disput[e] the design of the seat" or "touch upon standards of design" (Pet. 21, 26) are incorrect, and first surfaced on appeal. The warning claim depends on the design defect charge, and turns on it. Thus all of the alleged dangers to be warned about are without dispute consequences of the claimed shortcomings in the design. Accordingly, the complaint alleges that GM "fail[ed] to warn of the aforesaid defect," petitioner's interrogatory answers state that "GM should have warned [plaintiff's employer] and plaintiff of the potential risk of severe harm due to the defective design of the engineer's seat and appurtenances," and instructed how to move the seat as designed; and petitioner's papers opposing GM's initial summary judgment conclude "the design of the engineer's seat . . . was such that it required a warning."

[3] The trial court granted GM summary judgment on the design-defect claim after finding plaintiff's design expert unqualified.

"cover[s] the subject matter of the State requirement." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (common-law claim preempted).

The district court acknowledged the "litany of cases" holding that LIA preempts state law within the field LIA occupies, but denied summary judgment, finding no "direct[ ] conflict" with LIA or "detailed" federal regulations (although field, not conflict, preemption was in issue). (Pet. App. B at 14a-23a)

On appeal under 28 U.S.C. § 1292(b), the Second Circuit held that LIA preempted petitioner's claims. In line with *Napier* and every federal circuit to address the issue, it held that the field LIA occupies is defined by the authority that LIA grants the Secretary of Transportation; that the field specifically includes the design and construction of the locomotive and all its parts and appurtenances; that the locomotive seat and warnings with respect to it are well within that field; and that petitioner's common-law claims against GM regarding the locomotive seat's design and warnings in respect to it are therefore also well within that field. (Pet. App. A) Accordingly, the Second Circuit found that LIA preempted petitioner's claims and did not reach FRSA preemption.

SUMMARY OF ARGUMENT

It is settled that LIA occupies the field that is "within the scope of the authority delegated to" the Secretary of Transportation – including "the design, the construction and the material of every part of the locomotive and of all

appurtenances." The LIA therefore preempts any state law within that field, regardless whether the state law conflicts with federal regulations on point, or whether there are any federal regulations on point; whether there are or not "is without legal significance." *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 613 (1926). Congress occupied the field to preclude state-by-state variations in law respecting locomotives and their parts and appurtenances. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines – or conform them everywhere to the rule of the most exacting state – a burden Congress deemed intolerable.

Petitioner's state-law claim attacks the locomotive seat's design and warnings in respect to it. Both are indisputably within the Secretary's authority, and plaintiff does not claim otherwise. Hence the claim falls squarely within the preempted field, and so, the court of appeals properly held, is preempted under *Napier*.

Petitioner does not challenge *Napier* or the long line of cases following it. Instead, he protests that his failure to warn claim is not within the occupied field because it does not concern the locomotive seat's design. But it does, directly, and, as a matter of New York law and common sense, must. However, it would not matter if it did not because, without dispute, warnings with respect to the seat are "within the scope of authority delegated to" the Secretary to prescribe, and so within the occupied field.

Petitioner also protests that his state law claim is against a manufacturer, and that LIA does not expressly

apply to manufacturers. But it expressly does, and it also would not matter if it did not. Petitioner's claim is based upon a warning within the Secretary's authority to prescribe, and so remains preempted whether the claim is made against the railroad who buys the locomotive or the manufacturer who builds and sells it. Indeed, permitting states to require manufacturers to comply with varying state rules regarding locomotive parts and warnings would yield exactly the patchwork of conflicting state rules regarding them that LIA and *Napier* are meant to foreclose.

Nor is there any reason for this Court to visit these questions. The Second Circuit's decision accords with at least three other circuits', every one to consider the question. They hold common law claims in respect to locomotive parts and appurtenances, including common law warning claims against manufacturers, are well within the preempted field. Petitioner cites no case that holds otherwise. Therefore, *Napier*'s application here presents no conflict, or important question, or any question truly in dispute at all.

The case also presents no FRSA issue at all. The judgment rests on LIA, the court below never reached FRSA, and petitioner presents no question of importance under it in any event.

REASONS FOR DENYING THE PETITION

I. LIA PREEMPTS PETITIONER'S CLAIMS UNDER SETTLED LAW.

Article VI of the Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where (1) the state law conflicts with federal law; (2) the federal law occupies a field, and the state law falls within that field; or (3) federal law expressly preempts the state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987); *Michigan Canners & Freezers Assoc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

It is settled law that LIA occupies the field as to matters within the authority it confers on the Secretary. Petitioner's claim falls within that field. Therefore, it is preempted. When Congress occupies the field, "the states must leave all regulatory activity in that area to the Federal Government." *See Michigan Canners & Freezers*, 467 U.S. at 469.

A. The Settled Rule: LIA Preempts State Law on All Matters Within The Secretary's Authority Under LIA.

For 70 years, since Justice Brandeis' opinion for the Court in *Napier*, 272 U.S. 605, it has been settled that Congress intended LIA to preclude all state law

respecting locomotives and locomotive parts and equipment used in interstate commerce.

Napier expressly held that Congress intended LIA "to occupy the field" in respect to all areas subject to LIA, and that LIA accordingly preempted all state law within LIA's grant of authority to the Interstate Commerce Commission (or its successor, the Secretary of Transportation, via the Federal Railroad Administration[4]). *Id.* at 611, 613. Those areas include "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part." *Id.* at 608, 611. The Court found that LIA conferred on the Commission "general" power to regulate locomotive safety equipment, *id.* at 611-12, and that LIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further found that the state laws at issue were "within the scope of the authority delegated to the Commission" by LIA, *id.* at 611, and so were preempted regardless whether they conflicted with a federal rule, or whether there were any applicable federal rule at all:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door

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[4] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1192 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g).

> and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act,[5] as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

272 U.S. at 613 (emphasis added). In sum, "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Petitioner does not question *Napier* (indeed, barely mentions it) and it remains settled law.[6] *See, e.g., United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 461 (1935) (noting *Napier* holds that LIA occupies the field); *Urie v. Thompson*, 337 U.S. 163, 192 (1949) (same). *See also*, following *Napier*, *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (state could not impose failure-to-warn or design-defect liability, because warnings and designs are

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[5] LIA was then known as the Locomotive Boiler Inspection Act ("LBIA" or "BIA").

[6] The 1970 Federal Railroad Safety Act did not alter LIA's preemptive effect. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

"within the scope of the Secretary's authority"; "Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment"); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997) (states cannot impose liability for failure to install warning devices on locomotives because they are "within the scope of the authority of the [Secretary]") (citation omitted), *cert. denied*, 523 U.S. 1094 (1998); *First Security Bank v. Union Pac. R.R.*, 152 F.3d 877, 880-81 (8th Cir. 1998) (LIA preempts common-law action claiming that locomotive horn should be louder); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (Kennedy, J.) (LIA preempts common-law claim for failure to install device "within the scope of the Secretary's authority to prescribe"; "[f]ederal regulation of locomotive equipment under the [LIA] has been held a total occupation of the field, preventive of any state or local regulation on the same subject"); *Missouri Pac. R.R. v. Railroad Comm.*, 850 F.2d 264, 268-69 (5th Cir. 1988) (LIA preempts state requirement for telemetry devices), *cert. denied*, 488 U.S. 1009 (1989). Indeed, in 1983 this Court affirmed a decision that "[t]he LBIA completely preempts the field of locomotive equipment." *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 536 F. Supp. 653, 655 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.)[7].

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[7] The only question decided by the lower court in that case was preemption, and the Court's summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

There are at least three reasons for this settled rule. One, locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R.R. v. Pub. Service Comm.*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
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> * * *
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> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law, 114 F.3d at 910-11 (quoting *Southern Pac. Transp. Co. v. Oregon Pub. Util. Comm.*, 9 F.3d 807, 811 (9th Cir. 1993)); *accord* App. A at 5a-6a; *Marshall*, 720 F.2d at 1153; *First Security*, 152 F.3d at 880-81; *Springston*, 130 F.3d at 245.

Two, Congress decided that uniform, expert, federal regulation was best calculated to promote locomotive safety, and that piecemeal regulation would be disruptive. As FRA explained:

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations. . . . ¶ [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Railroad Occupational Safety and Health Standards; Termination 43 Fed. Reg. 10,583, 10,585-86 (1978). Thus, as this Court has taught, Congress' scheme leaves no room for ad hoc jury decisions about locomotives, their parts and use:

> There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. ***It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine renders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.***

Baltimore & Ohio R.R. v. Groeger, 266 U.S. 521, 530 (1925) (emphasis added).

Three, Congress provided a potent remedy for on-the-job injuries that "doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. That remedy is a Federal Employers' Liability Act suit. 45 U.S.C. § 51 *et seq.* In a FELA action, LIA imposes "upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). FELA, not a patchwork of state claims, is how Congress intended injured employees to be compensated. Petitioner here brought a FELA claim against his employer, and resolved it.

In sum, it is settled for good reasons that: (1) any state law within the authority delegated to the Commission is preempted, whether or not there are on-point federal regulations, and (2) the "design, the construction and the material of every part of the locomotive . . . and of all appurtenances" is squarely within that preempted field.

B. The Settled Rule Applied: LIA Preempts Petitioner's Claims.

The court of appeals simply applied *Napier* here (App. A at 4a-8a), and agreed with all the other courts of appeals that have likewise applied *Napier* to like claims. The court's analysis was absolutely right, indeed, inevitable.

The preempted field includes "the design, the construction and the material of every part of the locomotive . . . and of all appurtenances."[8] (P. 7, above) The engineer's seat is obviously a locomotive "part" or "appurtenance." Therefore, its design and construction are within the Secretary's authority and the preempted field; the Secretary's issuance and consideration of regulations on locomotive cab seat design, under authority of LIA, underscore that it is.[9] 49 C.F.R. § 229.121(a) (cab seat shall be "securely mounted and braced"). *See also* Passenger Equipment Safety Standards, 62 Fed. Reg. 49728, 49770, 49783, 49806, 49821, 49823 (1997) (proposed rules governing cab seat design on passenger-train locomotives); Special Safety Inquiry; Locomotive Control Cab Safety, 53 Fed. Reg. 36936,

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[8] Thus, for example, LIA preemption covers: warnings, engines, brakes and insulation, *Law*, 114 F.3d at 909-10; speed recorders and indicators, *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 655 (E.D. Pa. 1982); headlights and reflective tape, *Springston*, 130 F.3d at 243-45; *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (same); horns, *First Security Bank v. Union Pac. R.R.*, 152 F.3d 877, 880-81 (8th Cir. 1998); fire extinguishers and first-aid kits, *Missouri Pac. R.R. v. Railroad Comm.*, 833 F.2d 570, 576 (5th Cir. 1987); bell ringers, *Hines v. Smith*, 275 F. 766, 767 (7th Cir. 1921); radios, *Green v. River Terminal Ry.*, 585 F. Supp. 1019, 1027 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985); and of course fire boxes and cab curtains. *Napier*, 272 U.S. at 611-13. In short, "virtually all state regulations affecting the train itself appear preempted by federal law." *Missouri Pac. R.R. v. Railroad. Comm.*, 850 F.2d 264, 268 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

[9] They were also adopted under authority of the FRSA. *See* 49 C.F.R. Part 229, Authority note (citing both LIA and FRSA sections of 49 U.S.C.).

36938-39 (1988) (notice that FRA is reviewing cab seat design and other aspects of locomotive interiors). Petitioner's suggestion that federal regulation does not deal with "all aspects of cab seat design" (Pet. 21) is irrelevant; LIA preempts all matters within federal authority, exercised or not. *Napier*, 272 U.S. at 613; pp. 7-8, above.

Likewise, "warning requirements [with respect to locomotive parts and appurtenances] . . . are within the scope of the Secretary's authority – an authority which the Secretary has often invoked," and so are within the preempted field. *Law*, 114 F.3d at 911 (citing examples); App. A at 6a-7a. Indeed, petitioner does not claim otherwise, nor could he. The FRA is "broadly authorized [by LIA] to set the standards of compliance" for locomotives, to "remove unnecessary peril," and simply to "remedy shortcomings, other than purely mechanical defects, which may make operation unsafe." *Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481, 486-88 (1943) (LIA authorized ICC to impose a "continuing duty" to keep railway walkway clean; Act cannot be limited to cover "only defects in construction or mechanical operation") (citation omitted). FRA regulations, issued under the authority of LIA, in fact mandate numerous warnings and labels, particularly in the locomotive cab. *See* 49 C.F.R. §§ 210.27(d) (locomotive cab must bear label concerning wayside noise emission level); 229.113 (locomotive cab must bear warning label when steam generator has been shut down because of defect); 223.17 (cab of complying locomotive must bear label concerning window safety glazing); 229.47(a) (locomotive cab must contain sign indicating emergency brake valve); 229.11 (locomotive must bear serial number); 229.85 (any high-voltage

equipment must bear warning notice); 215.9(a)(3) (defective freight car must bear warning label); 215.301-215.303 (labeling of restricted freight cars and of other rolling stock); 218.73 (warning labels for occupied camp cars); 49 C.F.R. Part 229 Authority note.[10]

But, petitioner argues, warning claims as to parts aren't preempted although parts claims are, because a warning is not, itself, a part or appurtenance. (Pet. 21) Petitioner misses, and ignores, the point. Whatever the metaphysical definition of a "part" or "appurtenance," warnings are within the scope of the Secretary's authority to prescribe, and so well within the preempted field.

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[10] Petitioner says the FRA's existing warning requirements are not "intended to instruct a worker how properly to use a part," as he mistakenly asserts his claimed warning would. (Pet. 19; *see* p. 2 n. 2, above) That is a distinction without a difference; indeed, New York law recognizes no such distinction, and petitioner cites no authority suggesting that it does. Moreover, whether a warning merely alerts the user to a supposed defect or instructs how to avoid it has no relation to the threat of varying state regulation, FRA's superior expertise, or any other matter bearing on preemption. And an "instructional" warning, like any other, is well within the Commission's authority to prescribe, the Transportation Department is fully capable of requiring one, and has. *See, e.g.*, Boeing Model 737-100, -200, -300, -400, and -500 Series Airplanes, 62 Fed. Reg. 60810 (1997) (Federal Aviation Administration, Department of Transportation) (proposed rule requiring warning placard near a specific valve on particular manufacturer's airplanes); McDonnell Douglas Model DC-9-10, -20, and -30 Series Airplanes Equipped with a Non-ventral Aft Pressure Bulkhead, 55 Fed. Reg. 10601 (1990) (Federal Aviation Administration, Department of Transportation) (mandating posting of specific instructions near exit on particular manufacturer's airplanes).

Indeed, it would seriously compromise safety were a court to rule that the Secretary was not authorized to require warnings.[11] Furthermore, a patchwork of varying state warning laws within that the preempted field – like any other state laws within it – would destroy uniformity. That is, again, exactly what LIA and *Napier* are meant to foreclose. *Napier*, 272 U.S. at 613; *Law*, 114 F.3d at 911; pp. 10-11, above.

But, petitioner continues, his warning claim does not "dispute the design of the seat" or allege a defect in it. (Pet. 21, 26) But his warning claim specifically turns on the design of the seat and specifically alleges a defect in it. In fact, petitioner's charge is and must be that GM failed "to warn of the aforesaid defect" p. 2 n. 2, above; there can be no duty to warn under New York law unless the product is inherently or unreasonably dangerous – in other words, defective – absent the warning. *See*

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[11] It would also seriously compromise safety were warnings required that the Secretary has not chosen to require. Too many warnings divert attention from important ones, and dilute them. J. Henderson & A. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265 (1990); M. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. Rev. 121, 140 (1992); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984); *Broussard v. Continental Oil Co.*, 433 So.2d 354, 358 (La. App. 1983), *cert. denied*, 440 So.2d 726 (La. 1983); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between competing considerations of complete disclosure and the need to avoid informational overload") (emphasis added; citation and internal ellipses omitted); *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 360 (Tex. 1993) (the more instructions, the less likely one will be noticed).

McLaughlin v. Mine Safety Appliances Co., 226 N.Y.S.2d 407, 411 (N.Y. 1962) (duty to warn if product "inherently dangerous"); *Gordon v. Goldman Bros., Inc.*, 515 N.Y.S.2d 39, 40 (A.D.) (no duty to warn where product not inherently dangerous), *app. denied*, 522 N.Y.S.2d 110 (N.Y. 1987); *Young v. Elmira Transit Mix., Inc.*, 383 N.Y.S.2d 729, 731 (A.D. 1976) ("unreasonable risk of harm" from "latent danger" triggers duty to warn).

In short, petitioner alleges that GM failed to warn of the alleged design defect, so his claim requires proof of the defect claim that *Napier* indisputably preempts. (Pp. 7-9, 13-14, above) And indeed, petitioner's warning claim would, if allowed, undo *Napier*. For if petitioner could get around *Napier* by labeling his defect claim a failure-to-warn-about-that-defect claim, so could virtually any plaintiff: any design-defect claim can be transformed into a failure-to-warn-of-the-design-defect. *See* App. A at 5a-6a.

In sum, warnings in respect to the locomotive seat are well within the Secretary's authority to prescribe, and petitioner does not claim otherwise. Therefore, petitioner's warning claim is, without dispute, within the preempted field. Accordingly it is preempted.

C. Petitioner's Manufacturer Thesis Is Unsupported and Unsupportable.

Petitioner nevertheless argues that his claim, though within the preempted field, is saved because he brought it against a manufacturer. That argument is unsupported and unsupportable. All three circuits to consider the question hold that LIA preempts claims within the

occupied field against locomotive manufacturers: the Second below (App. A at 7a-8a), the Ninth in *Law*, 114 F.3d at 911-12, and the Sixth in *Springston*, 130 F.3d at 244-45; *see also First Security*, 152 F.2d at 880-81 (quoting *Law*). Petitioner says all three circuits are wrong, but cites no case that agrees with him. (Pet. 13-17) In fact, those uniform circuit court rulings are absolutely right for at least three reasons.

First, LIA by its terms applies to manufacturers, contrary to petitioner's claim. (Pet. 13-17) (arguing that LIA did not apply to manufacturers before railroad law was recodified in 1994, and Congress chose not to add manufacturers then). LIA expressly applied to "manufacturer[s] . . . of railroad equipment" before 1994. 45 U.S.C. § 34 (1993 version, currently restated and recodified at 49 U.S.C. § 21302). The 1994 recodification act omitted that as "surplus "(*see* 49 U.S.C. § 21302 and note), but the recodifying act's own text and legislative history make crystal clear that Congress intended no substantive change,[12] and the Act had previously applied

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[12] Revision of Title 49, Transportation, United States Code, Pub. L. 103-272, § 1(a), 108 Stat. 745 (1994) (recodifying statute; act restates existing law "without substantive change."), *id.* § 6(a), 108 Stat. at 1378 (recodifying provisions "may not be construed as making a substantive change in the laws replaced"); H.R. Rep. No. 108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820 ("In making changes in the language, precautions have been taken against making substantive changes in the law."). Minor changes to the language were made to promote clarity and consistency in the recodification, which placed all laws related to transportation in one comprehensive title. H.R. Rep. No. 108, *supra*, at 3, 5, *reprinted in* 1994 U.S.C.C.A.N. at 820, 822.

to manufacturers.[13] It also does now. Thus the agency's current regulations penalize any "manufacturer . . . of railroad equipment . . . who violates any requirement of . . . the Locomotive Inspection Act" – or who "causes the violation of any such requirement." 49 C.F.R. § 229.7(b), § 230.0 (similar).

Second, it would make no difference if the LIA did not specifically apply to manufacturers. Field preemption is not express or limited by the precise regulations an agency adopts within the field; it extends to the whole field and is implied from a statute's purpose, structure, pervasiveness and subject and the dominance of the federal interest. *See, e.g., Pennsylvania v. Nelson,* 350 U.S. 497, 504 (1956); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *Napier,* 272 U.S. at 612-13.

Here the preempted field is defined by the Secretary's authority, and includes the "design" and "construction" of the locomotive and its parts. *Napier,* 272 U.S. at 611. Manufacturers are at the center of that field; they design and construct locomotives. If states could set

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Indeed, Congress' recodification of the law without change, after the long line of decisions finding field preemption, affirms that *Napier* and progeny correctly gauged Congress' intent. *See Keene Corp. v. United States,* 508 U.S. 200, 212-13 (1993) (reenactment of statute implicitly adopts settled judicial construction); *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (same).

[13] When Congress expressly mentioned manufacturers in 1992, the provision did not "broaden the Secretary's jurisdiction," but made "explicit" the Secretary's "current authority" and "existing power over entities whose activities relate to rail safety," codifying the way the FRA "currently interprets rail safety laws." H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866, 879. See also n.12.

standards as to the locomotives a manufacturer designs and constructs, manufacturers would have to build and sell locomotives and locomotive parts that complied with those state standards. Railroads would likewise have to buy those locomotives and parts built to comply with those state standards; after all, they can only buy what the manufacturers build and sell. The upshot would be exactly what LIA and *Napier* forbid.[14] *See Law*, 114 F.3d at 910-11:

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulations would be undermined.[15]

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[14] Petitioner conceded below that this locomotive "complies with federal standards," Reply Brief in Court of Appeals at 8, but argues that a jury could still find the manufacturer liable under state law. (Pet. 15-16) That is the problem.

[15] The district court's decision in *Springston* explained that:

> plaintiff ignores the effect on the regulation of railroads that the adoption of his argument would have. It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such items . . . such goal would be compromised.

Springston v. Consolidated Rail Corp., 863 F. Supp. 535, 541 (N.D. Ohio 1994), *aff'd*, 130 F.3d 241, 244-45 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

In the end, petitioner proves the point. He says a manufacturer should be liable under varying state laws even for a locomotive that "complied with federal standards." (Pet. 15-16) That would make state, not federal, law the ultimate regulator; destroy uniformity; and leave locomotive design to "the varying and uncertain opinions and verdicts of juries" – the opposite of Congress' intent. Pp. 10-11, above; *Law*, 114 F.3d at 911-12:

> Imposing tort liability on railroad equipment manufacturers would . . . forc[e] them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts – a result the [LIA] was clearly intended to foreclose.

Third, field preemption turns on whether the subject of the claim is within the preempted field – not, as petitioner concedes, "on whom the legal duty is imposed." Pet. 15; *see Law*, 114 F.3d at 911-12; *Taylor AG Indust. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). The subject of this claim is locomotive seats and design, and warnings with respect to them. That subject is squarely within the preempted field, and so preempted.

In sum, the Second Circuit held that where "the design and construction of a part are in the hands of a manufacturer, the results that Congress had hoped to obtain through the BIA would be accomplished best by including the manufacturer." (App. A at 8a) Every circuit to reach the issue agrees. *Law*, 114 F.3d at 911-12; *Springston*, 130 F.3d at 244-45; *see also First Security*, 152 F.2d at 880-81 (quoting *Law*). Petitioner cites no circuit authority that disagrees. There is none.

D. Petitioner's Premise Is False.

Last, petitioner advises that "*Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) is most relevant," and notes that there this Court (a) found that the "federal manufacturing and labeling requirements at issue" reflected "generic concerns about device regulation generally," not "a specific device or field of device regulation," and (b) the "generality" of the state "requirements" at issue put them "outside the category of requirements" as to specific devices that that federal statute "envisioned." (Pet. 24-25)

Petitioner is way off the mark. *Lohr*, an express preemption case, held that the Medical Devices Act's express preemption clause did not apply to those general state requirements; there being no specific preempting federal regulation on point, those general state requirements simply could not implicate or affect one. This, however, is an occupation of the field, not express preemption, case. The state law in issue is well within the occupied field. (Pp. 12-17, above) Therefore, it is preempted regardless whether there is any on point federal regulation at all, specific or not; whether there is or not "is without legal significance." *Napier*, 217 U.S. at 613; pp. 7-8, 14, above. Or, as *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), put it: "If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted," conflicting or not.

To the extent petitioner claims that *Lohr* saves common law claims in general from preemption, he is certainly wrong. A majority of Justices agreed that even in that express preemption case, where federal law would preempt "a state statute, rule, regulation, or other

administrative action," it would also preempt "a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action." 518 U.S. at 504-05 (Breyer, J., concurring); *accord* 518 U.S. at 511 (O'Connor, J., joined by Rehnquist, Scalia & Thomas, JJ., dissenting);[16] *see Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). That echoes the Court's repeated holding, *e.g.*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (emphasis added):

> Our concern is with delimiting areas of conduct which must be left free from state regulation if national policy is to be left unhampered. Such ***regulation can be as effectively exerted through an award of damages*** as through some form of preventive relief. The ***obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy***. Even the ***States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme***.

Accord International Paper Co. v. Ouellette, 479 U.S. 481, 491-500 (1987) (common-law nuisance claims preempted),

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[16] As Justice Breyer explained, "To distinguish between [state regulations and common-law tort suits] would grant greater power (to set state standards 'different from or in addition to' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes," 518 U.S. at 504, an absurd result.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521-23 (1992) ("[c]ommon law damage actions" are "premised on the existence of a legal duty," and so impose "requirements or prohibitions"; quoting *Garmon* with approval); *CSX Transportation, Inc., v. Easterwood*, 507 U.S. 658, 664, 675 (1993) (FRSA preempts common-law claim).

The Court of Appeals here followed that settled rule. Thus, like every other circuit court to consider the issue, and following *Napier*, it found petitioner's common law claims, since within the occupied field, preempted. *See Law*, 114 F.3d at 910-11 (common-law defect and failure to warn claim preempted); *Springston*, 130 F.3d at 244-45(LIA preempts negligence claim against railroad and manufacturer for failure to install better warning devices); *First Security*, 152 F.3d at 880-81 (LIA preempts common-law action claiming that locomotive horn should be louder); *Marshall*, 720 F.2d at 1152 (Kennedy, J.) (LIA preempted negligence claim against railroad for failure to install better warning devices), *cited in* Pet. 20.

Napier has been the law for over 70 years. Petitioner cites no case from any court that questions *Napier*'s controlling force over claims like his, and no case that would allow his claim to proceed. The circuits are unanimous that it cannot. Petitioner presents no issue to review here.

II. THERE IS NO REVIEWABLE FRSA ISSUE.

The petition interweaves arguments about FRSA with petitioner's LIA arguments. At best, those FRSA arguments sow confusion between LIA's expansive field

preemption and FRSA's narrower express preemption. But there is no FRSA issue here. The court of appeals had no occasion to address FRSA because LIA preempted petitioner's claim. Moreover, this Court has already established that FRSA's preemption clause reaches common law claims and has determined the meaning, and limits, of that clause. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664-65, 675 (1993); pp. 2-3, 24, above. Petitioner presents no FRSA issue to review here.[17]

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[17] FRSA would require affirmance if the question were reached. The Secretary has enacted numerous regulations respecting locomotive warnings, expressly directed his attention to the seat, and specifically regulated as to it. (Pp. 13-15, above) In sum, it appears the Secretary has covered the subject of locomotive warnings and seats, so "additional" state requirements as to warnings or the seat are preempted. 49 U.S.C. § 20106. FRSA excepts from preemption only state law that (1) is "necessary to eliminate or reduce an essentially local safety hazard;" (2) is not "incompatible" with federal law or regulations; *and* (3) does "not unreasonably burden interstate commerce." 49 U.S.C. § 20106. Petitioner literally could not begin to meet that test; for to begin with, seat design and warnings are not "essentially local" concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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